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Maria Tunku Sabri v Datuk Wan Johani bin Wan Hussin

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HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S-22–669 OF 2005
ZABARIAH MOHD YUSUF J
9 SEPTEMBER 2010

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Contract — Marriage — Breach of promise — Plaintiff, a Muslim married woman at the time of entering into first agreement — Contingent condition ie, to obtain divorce — Contract breached before plaintiff able to fulfill the contingency — Settlement agreement ('SA') — Defendant breached SA when he failed to pay plaintiff amount stipulated in SA — Enforceability of SA — Whether plaintiff had capacity to enter into first agreement — Whether first agreement forbidden by law — Whether SA void as the object or consideration defeats the objective of s 14(1) of the Islamic Family Law (Federal Territories) Act 1984 — Whether SA void as was immoral and against public policy — Whether SA void for uncertainty of marriage — Contracts Act 1950 ss 11, 24(e), 33 & 57 — Islamic Family Law (Federal Territories) Act 1984 s 14(1)

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Islamic Law — Marriage — Breach of promise to marry — Plaintiff entered into first agreement to marry defendant during subsistence of her marriage to her lawful husband — Agreement based on contingency ie, to obtain divorce — Defendant breached his promise before plaintiff obtained divorce — Whether object of first agreement was to do unlawful act — Whether it was an illegal contract and therefore, void — Islamic Family Law (Federal Territories) Act 1984 s 14(1) — Contracts Act 1950 s 24(a)

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The plaintiff's cause of action against the defendant was based on a settlement agreement ('SA') entered into between the parties, due to the breach of promise to marry by the defendant to the plaintiff. The plaintiff contended that the defendant had breached the SA when he had failed to pay the plaintiff the amount stipulated in the SA within the stipulated time. The defendant however, contended that the SA or its execution was prohibited by law and was void due to the fact that the plaintiff was a married Muslim woman at the time of entering into the promise to marry, which the SA was based upon. The plaintiff however, alleged that the defendant had breached the promise to marry (the first agreement) before the plaintiff was able to fulfill the contingency ie, to obtain a divorce. The present application by the defendant was for the court to determine questions on points of law by way of O 14A of the Rules of the High Court 1980 ('RHC'). The questions posed were as follows: (i) whether or not the SA which was based upon the breach of promise to marry was legal and enforceable considering the status of the plaintiff at the

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time of the agreement; (ii) whether the SA was valid or void under s 11 of the Contracts Act 1950 ('CA') as the plaintiff did not have the capacity or was disqualified in law to enter into such promise to marry as provided under s 14(1) of the Islamic Family Law (Federal Territories) Act 1984; (iii) Whether the SA which was based on the said promise was void as the object or consideration was forbidden by law by virtue of s 14(1) of the Act 1984; (iv) whether the SA was valid or void under s 24(b) of the CA as the object or consideration would defeat the objective of s 14(1) of the Act 1984; (v) whether the SA was valid or void under s 24(e) of the CA as it was immoral and against the public policy as that would recognise or allow a married Muslim woman to enter into an extra marital affair; and (vi) whether the SA was valid or void for uncertainty of marriage between the plaintiff and the defendant due to the status of the plaintiff at the time of entering into the promise.

Held, allowing the defendant's application with costs:

(1) In this case, s 11 of the CA and s 14(1) of the Islamic Family Law (Federal Territories) Act 1984 applies. The plaintiff was not qualified to enter into an agreement (first agreement) to marry during the subsistence of her marriage to her lawful husband. Despite the fact that the subject of the application herein was an SA which was a promise to pay the plaintiff due to the breach of promise to marry, it was in effect enforcing the terms of the first agreement which was entered into by the married plaintiff who had no capacity to enter into the agreement to marry in the first place (see para 23).

(2) Section 14(1) of the Act 1984 expressly prohibits or forbids a married woman, during the subsistence of her marriage, to marry another man, (which the parties had contracted to do). Further, s 24 of the CA is explicit and that if an agreement is forbidden by law or of such nature that it would defeat the law, that agreement is unlawful and void. Clearly, the first agreement was of such a nature that it was for parties to do an act which was forbidden by the provisions of s 14(1) of the Act 1984. To enforce the first agreement by relying on the SA was akin to enforcing an agreement which is forbidden by law. The court will not enforce a contract which is expressly or impliedly prohibited by statute. If the court was to allow the plaintiff to enforce the SA, the court would be enforcing a contract (first agreement) which was prohibited by statute (see paras 27–29).

(3) The first agreement was intended to defeat the law and the SA was to enforce that first agreement, which amounted to enforcing a contract which was expressly prohibited by the law. The court would not enforce such contracts. In the event the court allows the enforcement of the SA, the court would be aiding the plaintiff, who in the first place came to court with unclean hands. Since the plaintiff was also implicated in the

illegality, the plaintiff could not sue to enforce the first agreement pursuant to the SA (see paras 34, 36–37).

(4) Likewise, by implication, the SA was also to enforce an agreement to do an impossible act, as the union in marriage between the plaintiff and the defendant was an impossible act. So long as the plaintiff was still married to her husband, the union between the plaintiff and the defendant was highly unlikely. Hence, the contract was a nullity pursuant to s 57 of the CA. This by itself indicated that the action by the plaintiff premised upon the SA, was a non-starter (see paras 39–41).

(5) It is trite law that uncertainty is one of the determining factors in deciding whether or not a promise/agreement is valid/void. As the agreement was based on contingency, it makes the promise uncertain. In this case, the said breach of promise to marry, which resulted in the SA entered into by the parties was void and illegal, as there was no certainty that there will be a divorce between the plaintiff and her husband. In any event, there was no certainty or guarantee that a Syariah Court would eventually grant a divorce to the plaintiff (see paras 44–46).

(6) There had been no divorce between the plaintiff and her lawful husband and there was never an occasion that the defendant refused to marry the plaintiff thereafter. By acknowledging that the first agreement was contingent upon her obtaining a divorce, the plaintiff admitted that: (i) there was a contingency that she was to obtain a divorce first from her husband; and (ii) at the time of the alleged breach by the defendant, the plaintiff was still lawfully married to her husband. Hence, the enforcement of the SA was definitely premature. This is where s 33 of the CA applies ie, contingent contracts to do or not to do anything if an uncertain event happens, cannot be enforced by law unless and until that event has happened (see paras 50–52).

(7) No Muslim woman can safely say that she can obtain a divorce from her husband. She is not the sole decision maker. The plaintiff could only petition for divorce but there was no guarantee of the same. It was therefore, wrong for the plaintiff to presume that she would certainly obtain a divorce from her husband to marry the defendant (see paras 55–57).

[Bahasa Malaysia summary

Kausa tindakan plaintif terhadap defendan di sini adalah berasaskan kepada perjanjian penyelesaian ('PP') yang dimasuki di antara pihak-pihak, disebabkan oleh kemungkiran janji untuk berkahwin oleh defendan kepada plaintif. Plaintif menghujah bahawa defendan telah memungkiri PP apabila dia gagal membayar kepada plaintif jumlah yang dinyatakan di dalam PP dalam tempoh yang dinyatakan. Defendan walau bagaimanapun, menghujah bahawa PP atau penandatanganannya adalah dilarang dari segi

undang-undang dan batal disebabkan oleh fakta bahawa plaintif adalah wanita Islam yang telah berkahwin pada masa memasuki perjanjian untuk berkahwin, yang merupakan asas PP. Plaintif walau bagaimanapun, mendakwa bahawa defendan telah memungkiri janji untuk berkahwin (perjanjian pertama) sebelum plaintif boleh memenuhi hal yang diluar jangkaan tersebut iaitu, mendapatkan cerai. Permohonan ini oleh defendan adalah untuk mahkamah memutuskan persoalan atas poin undang-undang melalui A14A Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Persoalan yang dikemukakan adalah seperti berikut: (i) sama ada atau tidak PP yang berasaskan kemungkiran janji untuk berkahwin adalah sah dan boleh dikuatkuasakan, mempertimbangkan status plaintif pada masa perjanjian; (ii) sama ada PP adalah sah atau batal di bawah s 11 Akta Kontrak 1950 ('AK') kerana plaintif tidak ada kapasiti atau tidak ada kelayakan dari segi undang-undang untuk memasuki perjanjian untuk berkahwin seperti yang diperuntukkan di bawah s 14(1) Akta Undang-Undang Keluarga Islam Wilayah Persekutuan 1984; (iii) sama ada atau tidak PP yang didasarkan atas perjanjian tersebut adalah batal kerana niat atau pertimbangan tersebut adalah dilarang dari segi undang-undang oleh s 14 Akta 1984; (iv) sama ada PP adalah sah atau batal di bawah s 24(b) AK kerana niat atau pertimbangan tersebut akan menidakkan niat s 14(1) Akta 1984; (v) sama ada PP adalah sah atau batal di bawah s 24(e) AK kerana ia tidak bermoral dan bertentangan dengan polisi awam kerana ia akan mengiktiraf atau membenarkan wanita Islam yang telah berkahwin berlaku curang; dan (vi) sama ada PP adalah sah atau batal kerana ketidaktentuan perkahwinan di antara plaintif dan defendan kerana status plaintif semasa memasuki perjanjian tersebut.

Diputuskan, membenarkan permohonan defendan dengan kos:

(1) Di dalam kes ini, s 11 AK dan s 14(1) Akta Undang-Undang Keluarga Islam Wilayah Persekutuan 1984 beraplikasi. Plaintif tidak layak memasuki perjanjian (perjanjian pertama) untuk berkahwin semasa perkahwinannya dengan suaminya yang sah. Walaupun fakta bahawa subjek dalam permohonan di sini adalah PP yang merupakan perjanjian untuk membayar plaintif kerana kemungkiran perjanjian untuk berkahwin, ia adalah sebenarnya menguatkuasakan terma-terma perjanjian pertama yang dimasuki oleh plaintif yang telah berkahwin yang tidak mempunyai kapasiti untuk memasuki perjanjian untuk berkahwin pada mulanya (lihat perenggan 23).

(2) Seksyen 14(1) Akta 1984 secara jelas menghalang atau melarang wanita yang telah berkahwin, semasa kesahan perkahwinannya, berkahwin dengan lelaki lain, (yang pihak-pihak mengkontrak untuk buat). Selanjutnya, s 24 AK adalah jelas dan bahawa jika sesuatu perjanjian adalah dilarang oleh undang-undang atau adalah bersifat menentang undang-undang, perjanjian sebegitu adalah tidak sah dan batal. Jelas, perjanjian pertama adalah bersifat bahawa adalah untuk pihak-pihak

untuk membuat sesuatu tindakan yang dilarang oleh peruntukan-peruntukan s 14(1) Akta 1984. Untuk menguatkuasakan perjanjian pertama dengan bersandar atas PP adakah seperti menguatkuasakan perjanjian yang dilarang oleh undang-undang. Mahkamah tidak akan menguatkuasakan kontrak yang secara langsung atau tidak langsung dilarang oleh statut. Jika mahkamah membenarkan plaintif untuk menguatkuasakan PP, mahkamah akan menguatkuasakan kontrak (perjanjian pertama) yang dilarang oleh statut (lihat perenggan 27–29).

(3) Perjanjian pertama diniatkan untuk menentang undang-undang dan PP tersebut adalah untuk menguatkuasakan perjanjian pertama, yang adalah untuk melaksanakan kontrak yang secara jelas dilarang oleh undang-undang. Mahkamah tidak akan melaksanakan kontrak yang sedemikian. Jika mahkamah membenarkan penguatkuasaan PP, mahkamah akan membantu plaintif, yang pada mulanya datang ke mahkamah secara tidak jujur. Oleh sebab plaintif juga dikaitkan dengan ketidaksahan, plaintif tidak boleh menyaman untuk menguatkuasakan perjanjian pertama menurut PP (lihat perenggan 34, 36–37).

(4) Seperti itu, secara implikasi, PP tersebut juga adalah untuk menguatkuasakan perjanjian untuk melakukan tindakan yang mustahil, kerana penyatuan dalam perkahwinan di antara plaintif dan dafendan adalah tindakan yang mustahil. Selagi plaintif masih berkahwin dengan suaminya, penyatuan di antara plaintif dan defendan adalah tidak mungkin. Dengan itu kontrak tersebut tidak sah menurut s 57 AK. Ini dengan sendirinya menunjukkan bahawa tindakan plaintif di sini berdasarkan kepada PP, adalah bukan pemula (lihat perenggan 39–41).

(5) Adalah undang-undang tetap bahawa ketidaktentuan adalah salah satu faktor penentuan dalam memutuskan sama ada atau tidak sesuatu janji/perjanjian adalah sah/batal. Oleh sebab perjanjian tersebut adalah berdasarkan kepada kontigensi, ia menjadikan janji tersebut tidak tentu. Di dalam kes ini, kemungkiran perjanjian untuk berkahwin, yang menyebabkan PP dimasuki oleh pihak-pihak adalah batal dan tidak sah, kerana tidak ada ketentuan bahawa terdapat perceraian di antara plaintif dan suaminya. Walau apa pun, tidak ada ketidaktentuan atau jaminan bahawa Mahkamah Syariah akan kemudiannya memberikan perceraian kepada plaintif (lihat perenggan 44–46).

(6) Tidak ada perceraian di antara plaintif dan suaminya yang sah dan tidak pernah ada kejadian bahawa defendan enggan berkahwin dengan plaintif kemudiannya. Dengan mengakui bahawa perjanjian pertama adalah kontingen kepada dia memperoleh perceraian, plaintif mengakui bahawa: (i) terdapat kontigensi bahawa dia akan memperoleh perceraian dahulu daripada suaminya; dan (ii) pada masa kemungkiran yang didakwa oleh defendan, plaintif masih secara sah berkahwin dengan

suaminya. Dengan itu, penguatkuasaaan PP tersebut sememangnya pra masa. Ini adalah di mana s 33 AK beraplikasi, ie, kontrak kontingen untuk melakukan atau tidak melakukan sesuatu jika sesuatu perkara yang tidak tentu berlaku, tidak boleh dikuatkuasakan oleh undang-undang kecuali dan sehingga perkara tersebut berlaku (lihat perenggan 50–52).

(7) Tidak ada wanita Islam yang boleh katakan secara selamat bahawa dia boleh mendapatkan perceraian daripada suaminya. Dia bukan satu-satunya pembuat keputusan. Plaintif hanya boleh mempetisyen untuk perceraian tetapi tidak ada jaminan bagi perkara tersebut. Ia adalah dengan itu, salah bagi plaintif menganggap bahawa dia akan mendapat cerai daripada suaminya untuk mengahwini defendan (lihat perenggan 55–57).]

Notes

For cases on breach of promise, see 3(3) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 5190–5197.

For cases on breach of promise to marry, see 7(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 4030–4031.

Cases referred to

Coramas Sdn Bhd v Rakyat First Merchant Bankers Bhd & Anor [1994] 1 MLJ 369; [1994] 2 CLJ 143, SC (refd)

Dato' Abdullah Hishan bin Haji Mohd Hashim v Sharma Kumari Shukla [1999] 2 MLJ 567, HC (refd)

National Land Finance Co-operative Society Ltd v Sharidal Sdn Bhd [1983] 2 MLJ 211; [1983] 2 CLJ 76 (refd)

Oh Thevesa v Sia Hock Chai [1992] 1 MLJ 215, HC (refd)

Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong [1998] 3 MLJ 151, FC (refd)

Singma Sawmill Co Sdn Bhd v Asian Holdings (Industrialised Buildings) Sdn Bhd [1980] 1 MLJ 21, FC (refd)

Legislation referred to

Contracts Act 1950 ss 11, 24, 24(a), (b), (e), 33, 57
Islamic Family Law (Federal Territories) Act 1984 s 14(1)
Rules of the High Court 1980 O 14A, O 18 r 19(1), O 33 r 2

Sangeet Kaur Deo (Karpal Singh & Co) for the plaintiff.
Jagjit Singh (Akberdin with him) (Akberdin & Co) for the defendant.

Zabariah Mohd Yusuf J:

[1] Enclosure 36 is the defendant's application for summary disposal of the

case under O 14A of the Rules of the High Court 1980.

BRIEF FACTS

[2] The plaintiff's cause of action against the defendant was based on a settlement agreement dated 10 March 2004 which was entered into between plaintiff and the defendant for the purpose of settlement due to the breach of promise to marry by the defendant to the plaintiff. The pertinent terms of the settlement agreement states as follows:

(A) The Second Party (Plaintiff) vide her solicitors, Messrs GANENDRAH & ASSOCIATES, Advocate & Solicitors, of Suite 402, 4th Floor, Wisma Lal-Doshi, 135, Jalan Tuanku Abdul Rahman, 50100 Kuala Lumpur (hereinafter referred to as 'the second part's solicitors') issued notices to the first party at three different addresses of the First Party claiming damages amounting to Ringgit Malaysia Ten Million (RM 10, 000, 000.00) for the sufferings and loss of reputation of the Second party resulting from the breach of promise to marry by the First Party.

(B) The First Party engaged the services of Messrs MAH WENG KWAI & ASSOCIATES Advocate and Solicitors, of 35, 3rd Floor, Jalan Medan Tuanku, 50300 Kuala Lumpur (hereinafter referred to as the first Party's solicitors) to reply to the Notices issued by the Second Party's Solicitors.

(C) …

(D) The parties hereto agree to settle their dispute upon the terms and conditions hereinafter appearing and to comply with the terms of this Agreement.

NOW IT IS HEREBY AGREED as follows:

In consideration First Party paying the Second party a sum of Ringgit Malaysia Five Million Five Hundred (RM 5,500,000.00) only (Hereinafter referred to as the 'Settlement Amount') in two payments, ie Ringgit Malaysia Two Million Seven Hundred and Fifty Thousand (RM 2,750,000.00) on or before 30th April 2004 and the balance before 14th May 2004, the Second Party agrees not to proceed with any further action against the First Party.

[3] The plaintiff contends that the defendant had breached the settlement agreement when he failed to pay the amounts within the stipulated time as stated upon his breach of the promise to marry the plaintiff. The plaintiff contends that she had stuck to her side of the bargain by not proceeding with any further action against the defendant for the said breach of the same.

[4] Essentially the defence of the defendant is that the settlement agreement was illegal on the following grounds:

(a) the plaintiff was a married Muslim woman at the time the agreement was entered into;

(b) the plaintiff lack the capacity to enter into the settlement agreement;

(c) the plaintiff was barred by s 14(1) of the Islamic Federal law (Federal Territories) Act 1984; and

(d) the agreement runs foul of s 24 (a), (b) and (e) of the Contracts Act 1950.

[5] It was pleaded by the defendant that the said agreement is not enforceable due to the fact that the plaintiff was a married Muslim woman at the time of entering into the promise to marry, which the settlement agreement was based upon.

[6] However according to the plaintiff the said promise to marry was entered into upon contingency that the plaintiff shall obtain a valid divorce from her husband first.

[7] The present application by the defendant is for the court to determine questions on points of law by way of O 14A of the Rules of the High Court 1980. The questions posed are as follows:

(a) whether or not the settlement agreement dated 10 March 2004 as per exh J1 encl 36 which was based upon the breach of promise to marry is legal and enforceable considering the status of the plaintiff at the time of the agreement;

(b) whether the said agreement is valid/void under s 11 of the Contracts Act 1950 as the plaintiff did not have the capacity/disqualified in law to enter into such promise to marry as provided under s 14(1) of the Islamic Family law (Federal Territories) Act 1984;

(c) whether the said agreement which was based on the said promise was void as the object/consideration is forbidden by law by virtue of s 14(1) of the Act 1984;

(d) whether the said agreement is valid/void under s 24(b) of the Contracts Act 1950 as the object/consideration would defeat the objective of s 14(1) of the Act 1984;

(e) whether the said agreement is valid/void under s 24(e) of the Contracts Act as it is immoral and against the public policy as that would recognise/allow a married Muslim woman to enter into an extra marital affair; and

(f) whether the said agreement is valid/void for uncertainty of marriage between the plaintiff and the defendant due to the status of the plaintiff at the time of entering into the promise.

THE COURT'S FINDING

[8] The settlement agreement dated 10 March 2004 entered into by the

parties was as a result of the defendant's alleged breach of promise to marry the plaintiff who was at that material time, a married Muslim woman (refer to cl A of the settlement agreement). This indicates that there was an earlier agreement ('the first agreement') between the parties wherein the defendant agreed to marry the plaintiff. These facts are not in dispute by the parties. The issue before the court is whether, the said settlement agreement is enforceable in law.

[9] The defendant avers that the settlement agreement/its execution is prohibited by law and is void due to the fact that the plaintiff, at the time when the first agreement was entered, was a Muslim woman. The plaintiff in turn pleaded that the agreement to marry (ie the first agreement) was entered on a contingency basis that the plaintiff is to obtain a divorce from her husband prior to the marriage. This is the condition that has been agreed upon by both parties when entering into the first agreement.

[10] The plaintiff pleaded that the defendant had breached the promise to marry (the first agreement) before the plaintiff was able to fulfill the contingency ie to obtain a divorce. This averment, according to the plaintiff has not been rebutted by the defendant.

[11] The plaintiff submits that in the light of this contingency, the settlement agreement cannot be illegal for the reasons pleaded by the defendant. It is not for the simple reason that the plaintiff was willing to first obtain a divorce from her husband. The plaintiff submits that if she was given the opportunity to do so, there would be no issue of immorality, illegality or it being against public policy as she would have been free to marry. The plaintiff further submits, the facts that as agreed by the defendant, the defendant breached the agreement before the plaintiff had the opportunity to obtain the divorce from her lawful wedded husband.

[12] It was after the breach by the defendant of the first agreement that the settlement agreement was entered into.

[13] The plaintiff states that the entire arguments by the defendant herein are in relation to the first agreement wherein the defendant had promised to marry the plaintiff.

[14] It was further contended by the plaintiff that the subsequent agreement (ie the settlement agreement) is a straightforward agreement to pay monies and in return the plaintiff does not take action against the defendant for having breached the promise to marry. The plaintiff submits that the basic elements of a contract are all present which makes the settlement agreement enforceable.

[15] Hence the plaintiff submits that the issues raised in the defence are not

relevant as they are concerned with the issues of breach of promise to marry ie the first agreement. Had the plaintiff attempted to enforce that breach of promise by the defendant, then those arguments may have been valid. However the suit herein is in relation to the subsequent agreement (settlement agreement) wherein the defendant agreed to pay and the plaintiff agreed not to take action against him. As the plaintiff has kept her part of the bargain, it is only fair that the defendant be made as well.

[16] After considering the submissions by both parties, I am of the view that the settlement agreement between the plaintiff and the defendant is void and invalid as it is unenforceable in law for the following reasons:

Incapacity of the plaintiff at the time the agreement was entered

[17] Section 11 of the Contracts Act 1950 provides that:

> Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, *and is not disqualified* from contracting by any law to which he is subject. (Emphasis added.)

[18] The first agreement is the promise by the defendant to marry the plaintiff. It is not disputed by the defendant in the written submission that this first agreement is void as the plaintiff was in no position to enter into the first agreement with the defendant, reason being that the plaintiff is a married Muslim w`oman at the relevant time. However, counsel for the plaintiff argued that the plaintiff had in no way contravened s 14(1) of the Islamic Family Law (Federal Territories) Act 1984 which states:

> (1) No woman shall, during the subsistence of her marriage to a man, be married to any other man.

as the plaintiff never did marry the defendant during the subsistence of her marriage with her lawful wedded husband.

[19] I agree that the plaintiff never did enter into any marriage with the defendant which can be said to be contravening the said section. However, it is to be observed that, the settlement agreement is in essence enforcing the terms of the first agreement, which in the first place the plaintiff was incapacitated from entering. So the issue arises, how can the plaintiff enforces the first agreement which in essence is void. How can there be a breach of the first agreement when the same is not enforceable as it is void and that the plaintiff is in no capacity to enter into the first agreement in the first place.

[20] The submission of the defendant which states that the plaintiff is only enforcing the settlement agreement which is a breach by the defendant to

marry the plaintiff and that the plaintiff is not marrying the defendant and hence is not caught by section s 14(1) of the Islamic Family Law (Federal Territories) Act 1984, is clearly misconceived. No matter how one looks at it, the subject matter of the settlement agreement is the breach of promise to marry. In essence there can be no breach of an unenforceable agreement.

[21] Thus s 11 of the Contracts Act 1950 applies.

[22] Section 14(1) of the Islamic Family Law (Federal Territories) Act 1984 also applies.

[23] In summary, the plaintiff is not qualified to enter into an agreement (first agreement) to marry during the subsistence of her marriage to her lawful husband. Despite the fact that the agreement which is the subject of the application herein is a settlement agreement which is a promise to pay the plaintiff due to the breach of promise to marry, it is in effect enforcing the terms of the first agreement which was entered into by the married plaintiff who has no capacity to enter into the agreement to marry in the first place.

The consideration of the settlement agreement is invalid

[24] The object of the settlement agreement is for purposes of settlement between the plaintiff and the defendant due to the breach of promise to marry by the defendant as stated in the first agreement.

[25] When the first agreement of promise to marry was executed the plaintiff was a married woman.

[26] Under s 24(a) of the Contracts Act 1950 an agreement is illegal and unenforceable when either the consideration or the object of the agreement is to do an act which is forbidden by law. It is illegal and unenforceable under s 24(a) of the Contracts Act 1950 because it is a contract involving consent of both contracting parties to do the very act prohibited or forbidden by statute.

[27] Section 14(1) of the Islamic Family Law (Federal Territories) Act 1984 expressly prohibits or forbids a married woman, during the subsistence of her marriage, to marry another man, (which the parties had contracted to do).

[28] Section 24 of the Contracts Act 1950 is explicit and that if an agreement is forbidden by law or of such nature that it would defeat the law, that agreement is unlawful and void. Clearly the first agreement is of such a nature that it is for parties to do an act which is forbidden by the provisions of

s 14(1) of the Islamic Family Law (Federal Territories) Act 1984. To enforce the first agreement by relying on the settlement agreement is akin to enforcing an agreement which is forbidden by law.

[29] The court will not enforce a contract which is expressly or impliedly prohibited by statute. If the court is to allow the plaintiff to enforce the settlement agreement, the court would be enforcing a contract (first agreement) which is prohibited by statute.

Contract falls under s 24(b) of the Contracts Act (consideration is unlawful as it defeat s 14(1) of the Islamic Family Law (Federal Territories) Act 1984)

[30] From Recital A and cl 2 of the settlement agreement it is clear that the object thereof is the breach to marry the plaintiff by the defendant, which is reproduced as follows:

> (A) The Second Party (Plaintiff) vide her solicitors, Messrs GANENDRAH & ASSOCIATES, Advocate & Solicitors, of Suite 402, 4th Floor, Wisma Lal-Doshi, 135, Jalan Tuanku Abdul Rahman, 50100 Kuala Lumpur (hereinafter referred to as 'the second part's solicitors') issued notices to the first party at three different addresses of the First Party claiming damages amounting to Ringgit Malaysia Ten Million (RM 10, 000, 000.00) for the sufferings and loss of reputation of the Second party resulting from the breach of promise to marry by the First Party.

Clause 2:

> The First Party agrees that all monies paid to the Second Party shall be for the purposes of settling the breach of promise to marry by the First party to the Second party and shall have no claims towards it or any part thereof upon payment.

[31] The primary purpose of the settlement agreement is to grant a remedy to the plaintiff as a result of the defendant's act of breaching his promise to marry the plaintiff.

[32] In the event the court grants the claim by the plaintiff, this court is impliedly acknowledging the fact that the plaintiff (whose marriage is still subsisting) can enter into an agreement to marry another man, when the very act of marrying is expressly prohibited by s 14(1) of the Islamic Family Law (Federal Territories) Act 1984. Here the consideration of the object of the first agreement was to do an unlawful act. The settlement agreement is enforcing the first agreement which is an illegal contract.

[33] For this I refer to the case of *Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong* [1998] 3 MLJ 151 where Peh Swee Chin FCJ said this:

A Thus under s 24(a) aforesaid, an agreement is illegal and unenforceable when either the consideration of the object of the agreement is to do an act forbidden by law, and this in my view is the culled essence of some part of the common law on illegality of contract, which says in a nutshell that a contract to do an act illegal by statute or prohibited or forbidden by statute is unenforceable and illegal. It is very important B to remember that it is distinguishable from another aspect or question as to whether a statute prohibits any contract. It is illegal and unenforceable under s 24(a) aforesaid because it is a contract involving consent of both contracting parties to do the very act prohibited or forbidden by statute. This position obtains as well when the terms of the contract amount inevitably to the same situation. Thus an C agreement to commit an offence as set out in the Penal Code is the simplest of examples of an agreement to do an act prohibited by statute.

To decide if s 24(a) makes a contract illegal and unenforceable in connection with a statute, and this bears repeating, *one must find out first if the statute prohibits or forbids the act which the parties have contracted to do by the contract in question, and not* D *whether the statute prohibits the contract or the making of the contract in question by the parties.* This difference is real, though very subtle. In my view the failure to bear in mind this fine distinction has given rise to some difficulties.

E **[34]** The first agreement was intended to defeat the law and the settlement agreement is to enforce that first agreement, which amounts to enforcing a contract which is expressly prohibited by the law. The court will not enforce such contracts. In the case of *Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong*, Lamin PCA stated:

F The second principle is that the court will not enforce a contract which is expressly or impliedly prohibited by statute.

[35] Further in the case of *Coramas Sdn Bhd v Rakyat First Merchant Bankers* G *Bhd & Anor* [1994] 1 MLJ 369; [1994] 2 CLJ 143, where Edgar Joseph Jr SCJ as he then was states:

In our general survey of the authorities under s 24 of the Contracts Act, cited in Pollock, we encountered the case of *George v Greater Adelaide Land Development Co* H *Ltd* (1929) 43 CLR 91, which shows that a statutory prohibition against an agreement need not be express so long as it is implied.

[36] Section 14(1) of the Islamic Family Law (Federal Territories) Act 1984 explicitly prohibits, one like the plaintiff from marrying during the subsistence I of her marriage to her husband, impliedly, this means that an agreement to do such prohibitory act is also forbidden by law. In the event the court allows the enforcement of the settlement agreement, the court would be aiding the plaintiff, who in the first place came to court with unclean hands. In such a situation, it is my view that the court should not condone the act of the

plaintiff. Azlan Shah CJ Malaya in the case of *Singma Sawmill Co Sdn Bhd v Asian Holdings (Industrialised Buildings) Sdn Bhd* [1980] 1 MLJ 21, at p 25 has this to say:

> The courts do not overlook the fact that they do not assist a person who comes with unclean hands. In the words of Lindley LJ in *Scott v Brown, Doering, Mc Nab & Co*:
>
> No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality.

[37] Clearly, in our case herein, the plaintiff is invoking the help of the court to enforce the first agreement which is illegal. Since the plaintiff is also implicated in the illegality, the plaintiff cannot sue to enforce the first agreement pursuant to a settlement agreement.

The agreement was to do an impossible act

[38] The first agreement was an agreement to do something which s 14(1) of the Islamic Family Law (Federal Territories) Act 1984 forbids. It is also an illegal contract pursuant to s 24(a) of the Contracts Act 1950.

[39] Likewise, by implication, the settlement agreement is also to enforce an agreement to do an impossible act, as the union in marriage between the plaintiff and the defendant is an impossible act. So long as the defendant is still married to her husband, the union between the plaintiff and the defendant is highly unlikely.

[40] Hence the contract is a nullity pursuant to s 57 of the Contracts Act 1950 which states:

> (1) An agreement to do an act impossible in itself is void.

[41] This by itself indicated that the action by the plaintiff herein premised upon the settlement agreement, is a non starter.

Agreement was based on contingency

[42] The plaintiff contended that such promise is not contrary to s 14(1) of the Islamic Family Law (Federal Territories) Act 1984, as it was made upon contingency, which means the plaintiff will only marry the defendant after her divorce with her lawful husband. The plaintiff stated that she is not marrying the defendant during the subsistence of her marriage, but only after getting a

divorce from her husband, only then would she marry the defendant. This is clear from the pleadings of the plaintiff when she says at para 7 of the defence:

> … plaintiff … memplid bahawa berdasarkan kontingensi bahawa beliau akan memperolehi satu perceraian yang sah terlebih dahulu, tiada sebarang ketidaksahan dari segi Akta Kontrak 1950 atau pun Akta Undang-Undang keluarga Islam (Wilayah-Wilayah Persekututan) 1984.

[43] However, as the agreement was based on contingency, it makes the promise uncertain. What if the divorce does not take place or the husband does not want to divorce? What then happens to the first agreement to marry?

[44] It is trite law that uncertainty is one of the determining factor in deciding whether or not a promise/agreement is valid/void. Section 33 of the Contracts Act 1950 states:

> Contingent Contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened.

[45] In this case, the said breach of promise to marry, which resulted in the settlement agreement entered into by the parties is void and illegal, as there is no certainty that there will be a divorce between the plaintiff and her husband.

[46] In any event, there is no certainty or guarantee that a Syariah Court would eventually grant a divorce to the plaintiff.

[47] This was explained in the case of *National Land Finance Co-operative Society Ltd v Sharidal Sdn Bhd* [1983] 2 MLJ 211; [1983] 2 CLJ 76 where Salleh Abas CJ delivering the judgment of the Federal Court states that:

> it is therefore obvious that the parties have entered into a sale contingent upon the approval of the transaction by the FIC over which the parties had no control. There was no promise, not guarantee that such approval would be given. Such a condition, in our judgment, is more than a mere essential of the contract, a breach of which entitles an innocent party to regard itself as discharged from further performance and to sue for damages. It is, however, a condition which is known in the law of contract as a contingent condition, the effect of which is that contract shall not take effect unless and until the condition is fulfilled … Until the FIC approval was given, liability for further performance remained unenforceable, ie suspended although neither the respondents nor the appellants could resile from it until it could be definitely ascertained that the condition could not be fulfilled. This is in effect laid down by s 33(a) …

The settlement agreement is premature

[48] The plaintiff is contending that the settlement agreement is as a result of

the defendant's breach of promise to marry the plaintiff. The contention of the plaintiff here is that the defendant had breached his promise to marry the plaintiff before the plaintiff obtained a divorce.

[49] Where is the breach of promise committed by the defendant, when at the material time, the plaintiff was in no capacity to marry the defendant. The circumstances would be different if the plaintiff had divorced the husband and the defendant refused to marry the plaintiff.

[50] There had been no divorce between the plaintiff and her lawful husband and there was never an occasion that the defendant refused to marry the plaintiff thereafter.

[51] By acknowledging that the first agreement was contingent upon her obtaining a divorce, the plaintiff admitted that:

(a) there is a contingency that she is to obtain a divorce first from her husband; and

(b) at the time of the alleged breach by the defendant, the plaintiff was still lawfully married to her husband.

[52] Hence the enforcement of the settlement agreement is definitely premature. This is where s 33 of the Contracts Act 1950 applies ie contingent contracts to do or not to do anything if an uncertain event happens cannot be enforced by law unless and until that event has happened.

[53] In our case there was never any divorce between the plaintiff and her legally married husband.

Divorce for a Muslim woman is not as of right

[54] A Muslim woman's petition for divorce is subject to Islamic laws of *fasakh* whereby there is a threshold to be satisfied before the Syariah Court ie proof that she has been abused, subject of neglect and the like. *Fasakh* is not as of right according to the woman's fancy. It is subject to the consent of the husband and the Syariah Court. Objection by either party renders the petition dismissed.

[55] As far as the *talaq* is concerned, that right lies with the husband, and this too with the approval of the Syariah Court. No Muslim woman can safely say that she can obtain a divorce from her husband. She is not the sole decision maker.

[56] The plaintiff can only petition for divorce but there is no guarantee of the same.

[57] Hence, the long and short of it all, is that no Muslim woman can obtain a divorce as of right as the decision does not lie on her alone. It is wrong for the plaintiff to presume that she would certainly obtain a divorce from her husband to marry the defendant.

[58] The defendant cited the case of *Oh Thevesa v Sia Hock Chai* [1992] 1 MLJ 215 where the plaintiff instituted an action against the defendant for damages for breach of promise to marry. In that case the defendant filed an application to strike out the action by the plaintiff. However Lim Beng Choon J states that the case is not suitable to be struck out as the validity of a promise to marry made by a defendant (who was at the time of making the promise was already married), to a plaintiff who, when the promise was made, was aware of his status, has not been fully settled in law. In fact it was held that this issue raised required a mature and careful consideration on a serious point of law. It was held that 'The defendant cannot drive away the plaintiff from the judgment seat by utilising the summary procedure O 18 r 19(1). He should have adopted the procedure under O 33 r 2'.

[59] The facts and the basis for determination in *Oh Thevesa v Sia Hock Chai* is a far cry from the facts of our case herein. The basis for consideration in that case was on a striking out application under O 18 r 19 as opposed to our situation where it is for the determination under O 14A of the Rules of the High Court 1980. In fact the court in *Oh Thevesa v Sia Hock Chai* did indicate that the defendant should have moved the court via O 33 r 2 of the Rules of the High Court 1980. In any event, the case of *Oh Thevesa v Sia Hock Chai* did not indicate whether the plaintiff was a married woman when the promise to marry was made by the defendant. In our case clearly the plaintiff is a married Muslim woman at the time the promise to marry was made.

[60] In the case of *Dato' Abdullah Hishan bin Haji Mohd Hashim v Sharma Kumari Shukla* [1999] 2 MLJ 567, the defendant was a non-Muslim woman and therefore was not in violation of s 14(1) of the Islamic Family Law (Federal Territories) Act 1984.

[61] Hence, the cases relied on by the plaintiff can be distinguished on its facts with our present case.

CONCLUSION

[62] Therefore the defendant's application to dispose the matter by way of O 14A is allowed with costs.

[63] The answer the questions in encl 36 are as follows:

Question (a): Perjanjian tersebut dan perlaksanaannya tidak di benarkan oleh Undang-Undang dan perjanjian tersebut adalah terbatal.

Question (b): Perjanjian tersebut dan perlaksanaannya tidak di benarkan oleh Seksyen 11 Akta Kontrak 1950 kerana Plaintiff tidak layak memasuki perjanjian tersebut;

Question (c): Perjanjian tersebut dan perlaksanaannya tidak di benarkan oleh Undang-Undang dan terbatal di bawah seksyen 24 (a) Akta Kontrak 1950:

Question (d): Perjanjian tersebut dan perlaksanaannya tidak di benarkan oleh Undang-Undang dan terbatal di bawah seksyen 24 (b) Akta Kontrak 1950 kerana objektifnya melanggar Section 14 (1)of the Islamic Family Law (Federal Territories) Act 1984:

Question (f): Perjanjian tersebut dan perlaksanaannya tidak di benarkan oleh Undang-Undang dan terbatal memandangkan perkahwinan antara Plaintiff dan Defendant adalah suatu perkara yang mustahil untuk dilakukan kerana Plaintiff masih bersuami dan masih dalam masa perkahwinannya ketika perjanjian tersebut di masuki oleh kedua-dua pihak.

[64] I chose not to answer question (e) as it is not appropriately worded and in any event the answers to the five questions above is already sufficient to dispose of the matter herein.

[65] Enclosure 36 is allowed with costs.

CONSEQUENTIAL ORDER

[66] The writ and statement of claim is hereby dismissed with costs.

Defendant's application allowed with costs.

Reported by Ashgar Ali Ali Mohamed